

The CURE

Contract User's Resource for Excellence

The "CURE" is a quarterly newsletter of the State Controller's Office

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News From The SCO **A State Controller's Office Update**

Phase II Waiver Program

In a memorandum dated December 1, 1997, the State Controller invited state agencies and institutions to participate in a new "Phase II" Waiver Program. The new "Phase II" Waiver Program provides state departments, agencies, and institutions of higher education (state agencies) the ability to approve state contracts up to a certain dollar threshold without a formal review and approval by the designated assistant or special assistant attorney general and the State Controller's Office. Participation in this program is voluntary and state agencies must meet certain requirements in order to participate.

State agencies wishing to participate in the new "Phase II" Waiver program must submit a written request to the State Controller. State agencies are responsible for determining if they have the resources to adequately train personnel and oversee contracting within the scope established by the program. State agencies who participate in this waiver program may be permitted to execute state contracts having a total value of \$25,000 or a lesser amount as determined by the state controller without a formal review by a designated assistant or special assistant attorney general, or review and approval by the SCO.

Prior to approving a state agency's application to participate in the "Phase II" Waiver Program, the State Controller's Office will conduct a desk as-

essment to confirm that the personnel identified by the state agency to manage the program fully understand the scope and limits of the program.

If you would like to know more about the "Phase II" Waiver Program, please contact the SCO.

Revisions to the *Manual* *by CAROL LIEBER*

The Division of State Buildings and Real Estate Programs has proposed the following changes to the Manual:

- ♦ Chapter 6, page 4, sentence No. 3: add "and industrial hygienist services" after "architectural services;"
- ♦ Chapter 8, page 4, sentence No. 3 under Exceptions: add "and industrial hygienist" after "land surveyor;"
- ♦ Chapter 9, page 5, C: add "and Industrial Hygienist)" after "Land Surveyor)"
- ♦ Standard Architect/Engineer Contract (SC-5.1): Article 20, Professional Liability or Errors and Omissions, page 12 of 18, make the following revision: "attributable to bodily injury or death, or to injury to or destruction of tangible property, or to failures of the structure or facility, including the loss of use resulting therefrom, and is caused, in whole or in part,"

Invitation for Bids and Requests for Proposals

by BARRY RYAN, Department of Law

Questions have been raised by state agencies concerning: 1. Whether an Invitation for Bid (IFB) or a Request for Proposal (RFP) should include terms that will be used in contracts resulting from such IFBs/RFPs; and 2. If so, what contract terms should be included.

1. IFBs must include all contractual terms and conditions applicable to the procurement (See,

§ 24-103-202 (2)(a), C.R.S.)

Contract terms directly affect the cost/price of bid work (e.g., insurance; bonds; liquidated damages). Therefore, the statute requires that an IFB include contract terms so that the vendor can determine that cost and their bid.

If a State agency fails to include a proposed contract term in the IFB, but then attempts to require that term in the contract, the low responsible bidder is not required to accept that term. Further, if the agency insisted on that term and/or awarded to the next bidder if the low responsible bidder did not agree to accept that term in the contract, the agency risks violating the competitive bid statute.

On the other hand, if the agency includes all proposed contract terms in the IFB that it needs, the low responsible bidder **must agree** to those terms in the contract or risk a determination that it is non-responsive/responsible.

2. RFPs should include all contractual terms and conditions that an agency needs to ensure will be in the contract.

Unlike IFBs, there is no statutory requirement that "all contractual terms and conditions applicable to the procurement" be included in the RFP. However, as a practical matter, an agency should include in the RFP all contract terms that it needs for that particular solicitation.

If the RFP also has language that makes clear that, by submitting a proposal, the proposer thereby agrees to all contract terms included therein, the proposer is locked in, and it cannot then attempt to "negotiate" such terms when it comes time to execute a contract.

It has already agreed!

If an agency does not include in the RFP all contract terms that it needs for that particular solicitation, the proposer can then attempt to "negotiate" such terms when it comes time to execute a contract (**since it has not already agreed in the RFP**), and the agency risks either by not getting that term in the contract or getting a protest if it goes to the 2nd ranked proposer.

It is good contract preparation and contract administration practice to have a draft contract prepared **before an RFP is issued**, and to include such contract terms in the RFP. See, e.g., the State Contract Procedures and Management Manual, p. 4-4 and p. 6-17 re: "Vendor Forms".

3. The particular contract terms to be included in the IFB/RFP depend upon the nature of the product/work.

The agency should review a proposed solicitation to determine whether that it creates special contract needs. That determination depends on the facts. If such needs are present, then an appropriate contract term needs to be included in the solicitation.

This especially helpful where the agency knows in advance that a particular solicitation will involve certain risk/performance issues, since including appropriate terms will ensure that the agency's interests will be protected in the contract.

4. Model Contract Clauses

The "Model Contract Clauses", in Appendix A (starting at page 6-40) of the Contract Procedures and Management Manual are a good starting point. An agency should select those model clauses that may be appropriate for the facts of that particular solicitation and include those selected clauses in the solicitation.

Finally, an agency should not include in a solicitation any term that it is not willing to agree to in the contract, since that may obligate the agency to

From the Division of State Purchasing

by *LORAIN BURGER*

1. Basic Procurement Training will take place in Pueblo on January 28 & 29. Contact Loraine Burger at 303/866-6162 for information and to enroll.

2. Group I Agencies. When the Division of Purchasing has issued a Procurement Summary form (after having conducted a competitive solicitation for a Group I Agency), the agency should also use a copy of that form when routing amendments and extensions. Thus, the amendments and extensions need not be routed for clearance through State Purchasing.

3. All agencies should follow these procedures when making sole source procurements:

a. Remember to negotiate with the vendor as to price. Often an agency can get a better price through negotiation. See the Contract Management Manual for guidance in negotiating.

b. Be sure to get a written quotation from the vendor when a final price, specification and terms and conditions have been agreed to. This written quote must be part of your procurement file.

REMINDERS:

1. Be sure to use standard state contracts when procuring services (such as computer programming) from vendor who have a state award (price agreement). The Colorado Fiscal Rules REQUIRE that standard state contract forms be used for service procurements exceeding \$25,000. You may NOT use a PG (in COFRS) to document these services (exceeding \$25,000).

2. If your winning vendor is an out-of-state company or individual, Colorado law **requires** you to apply reciprocal preferences (see C.R.S. 8-18-101). The State of Oregon maintains an electronic *summary* of state reciprocal preference laws on their home page:

www.das.state.or.us

Click on: Purchasing (yellow building)

Click on: Oregon Purchasing Contacts and Links

Click on: Oregon Reciprocal Preference Law
(under Purchasing Links)

Click on: Index for all states

Click on: the state where your low bidder is located

Also, NIGP publishes a summary list of state preferences. DoP has not compared the two lists.

3. Unsolicited proposals and certain public-private ventures are now *exempt* from the Procurement Code (CRS 24-101-105).

4. A standard state contract is ALWAYS required for the procurement of construction related services, such as architects, engineers, land surveyors, landscape architects, and industrial hygienists. (PO's are not allowed to secure any of these services.)

5. Before you can get a contractor to do data entry, you *must* get approval from the the Pueblo Data Entry Center, which is authorized by state law to provide data entry for state agencies.

6. Be sure to verify that service providing vendors have, and maintain during the term of state performance, appropriate and adequate insurance.

On the Internet

By the time this issue of the *CURE* is out to state agencies and institutions, both the Contract Procedures and Management Manual and the Contract Processing Guide should be available on the Internet. The SCO is in the process of placing both documents on the State Controller's "web site". The address for both documents is :

governor.state.co.us/gov_dir/gss/acc/contract/contract.htm

Placing the documents on the Internet allows more flexibility for our customers. The *Manual*, *Guide* , or any part or either document may be down loaded and printed. The documents can be searched, using a "key" word(s) to locate specific information. Perhaps the biggest single advantage is that the "Model Contract Clauses" in Appendix A of Chapter 6 can now be used by state agencies in developing contracts and amendments.

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Farewell and Best Wishes

At the end of February, after six years of serving as the Administrator of Real Estate Contracts within State Buildings and Real Estate Programs (SBREP), I will be retiring. As I look back on the accomplishments of the SBREP and of the Real Estate Section in particular, I feel that one of our major accomplishments has been to make our entire organization much more "user friendly". Because of our firm conviction of providing service, those requiring our services would call in the early stages of a real estate transaction and thereby prevent a multitude of later problems. I have tried hard to foster this kind of an environment. I feel that I have largely succeeded and I hope that all of you with whom I've had the pleasure of working feel the same way.

Following my departure, Michael Frieman who can be reached at (303) 866-2874, will be your point of contact at the Real Estate Section of SBREP. I am sure he will provide the same kind of helpful assistance that I've tried to make a hallmark of the Real Estate Section.

So, as I finalize my plans to spend winters in San Diego and summers in Rocky Mountain National Park, I wish all of you the best in meeting the ongoing challenges, as you further improve Colorado State Government for all of us.

CCIT Meeting

Wednesday January 21

State Services B-70 1525 Sherman St.

Agenda

9:00-9:15	Training Update & Committee	John Ivy
9:15-9:25	Phase II Waivers	Phil Holtmann
9:25-9:55	Task Orders	Richard Pennington
10:00-10:20	Scope of Procurements	Jane Lopez
10:20-10:50	IT Property Rights & License	Richard Pennington
10:50-11:00	Retirement from SBREP	Jeff Brauer
11:10-11:30	Other Topics	CCIT Members